

## NOTES AND COMMENTS

### CURING DEFECTS OF NATURAL JUSTICE BY APPEAL

The recent appearance in the law reports of two British Commonwealth decisions (*Calvin v Carr* [1979] 2 All ER 440 (PC) and *Pollock v Alberta Union of Provincial Employees* (1979) 90 DLR (3d) 506 (Alberta SC)) provides an opportunity to consider some of the interesting problems raised by the question whether a defect of natural justice at a first hearing may be cured by a domestic or appeal body at a later stage. It is necessary to canvass the status of the first decision as well as the pragmatic and logical difficulties presented by a possible appeal against such a decision. However, each of these issues constitutes a complex problem in its own right. This note merely seeks to draw attention to them and to put forward some tentative suggestions and criticisms. A consideration of the Commonwealth cases is useful, since it is from similar cases that our Appellate Division has drawn assistance when considering these issues.

#### *The Effect of an Appeal*

*The general principle.* Where an administrative organ or domestic tribunal is required to observe the principles of natural justice and fails to do so, its act is invalid and this invalidity cannot be cured by a subsequent appeal or in any other manner short of a hearing *de novo*. This was made quite clear by the Appellate Division in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A), where the respondents had argued (*inter alia*) that even if they had not given a jockey a fair hearing at an initial inquiry, they had subsequently afforded him ample opportunity to put his side of the case during the appeals that he made within the appeal mechanism of the Jockey Club rules. Botha JA (delivering the unanimous judgment) found that the initial hearing had not been in accordance with the 'fundamental principles of justice' and that it should have been set aside by the appellate organs within the Jockey Club. Failure by them to do so, even though they might have remitted the matter for further hearing or, indeed, heard further evidence themselves, could not cure the defect:

'Where the decision of an inquiry board is vitiated by a disregard of the fundamental principles of justice, the matter cannot be corrected by a remittal or by further evidence, or in any other manner short of a hearing *de novo*; and the person affected can always seek redress in the ordinary courts of law . . . (at 655D).

' . . . I conclude that the finding of the stipendiary stewards against the appellant . . . was vitiated by a disregard of the requirements of natural justice, and that it

was not cured or remedied in the hearing of the appeal before the Local Executive Stewards or the Head Executive Stewards, and must accordingly be set aside' (at 659D-E).

In reaching this conclusion, the court referred with approval to a Privy Council decision, *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945 (PC), and the judgment of Megarry J in *Leary v National Union of Vehicle Builders* [1971] Ch 34, both of which provide direct support for the principle. A Canadian decision, *King v University of Saskatchewan* [1969] SCR 678, (1969) 6 DLR (3d) 120, which had been used by the respondent's counsel to support the contrary view, had been distinguished by Megarry J in *Leary*, and Botha JA accepted the distinction (at 659C-D of the *Turner* report). *Annamunthodo* and *Leary* were cited extensively by Botha JA. It is of interest and relevance to South African law to note that the same issue has recently been afforded considerable attention by the Privy Council in *Calvin v Carr* [1979] 2 All ER 440 (PC) and the Alberta Supreme Court in *Pollock v Alberta Union of Provincial Employees* (1979) 90 DLR (3d) 506 (Alberta SC).

*A qualification to the general principle.* In *Pollock* delegates to a union convention had voted to increase the monthly dues charged to members. Mrs Pollock, who was a member of the union (but not a delegate to the convention), had circulated a petition for signature by members seeking to have the increase suspended until the question could be voted upon at a general referendum. She also wrote letters to certain newspapers complaining about the increase in rather strong terms. For this she was suspended conditionally by the union discipline committee upon the basis of various disciplinary charges. She appealed to the provincial executive of the union and later to the full union convention, but the suspension conditions were modified only slightly. She then renewed her appeals on the basis that in neither of the previous appeals had she been given a fair hearing, and the Provincial Executive agreed to hear her again. The appeal was partially successful this time, but she was still suspended for one year. She then sought relief in the courts.

After reviewing the authorities which make it clear that domestic tribunals must observe the principles of natural justice where this is not expressly excluded by contract (at 512-13; cf *Turner* 1974 (3) SA 633 (A) at 644-6), Laycraft J found that the first two appeals were not in accordance with 'general standards of fair play' (at 513). In determining whether this failure could have been cured by the second hearing before the provincial executive, he considered both *King* and *Leary* (*supra*), distinguishing the former (in which the Supreme Court of Canada had held that a fair hearing on appeal had cured earlier defects) on the ground that the appeal body in that case was not really an appeal body at all, but had 'original jurisdiction as the triers of fact' ((1979) 90 DLR (3d) at 515-16). This was the ground upon which *King* had been distinguished by Megarry J in *Leary*, and Laycraft J pointed

out that this distinction has been adopted in British Columbia and Nova Scotia (at 516). Thus it is important to ascertain whether the 'appeal body' is really an *appeal* body at all. For it may well be that such a body is capable of affording the aggrieved person a 'hearing *de novo*'. This point would appear to have been accepted by the court in *Turner*, where Botha JA found Megarry J's reasoning in distinguishing *King* to be 'adequate' and 'convincing'.

Of course, if the appeal body does not have 'original jurisdiction', then, as Megarry J said, 'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body' ([1971] Ch 34 at 49F).

*Is there a general principle at all?* What has become clear, therefore, is that not all 'appeals' may be viewed simply as such by the court; and where the court concludes that the appeal itself constituted a rehearing, it may find that any defects which may have occurred at the first hearing could be cured by the 'appeal'. This, indeed, was the position taken by the Privy Council in *Calvin's* case.

Calvin was the owner of a New Zealand-bred racehorse which had been entered for a race in New South Wales, Australia. Although the horse was well bred, had shown good form in New Zealand, and was popular in the betting, it ran a poor fourth. An inquiry was instituted by the stewards, who came to the *prima facie* opinion that the horse had not run a straight course and that the jockey had not run the horse in the proper manner. On this basis, they brought charges under the Rules of Racing of the Australian Jockey Club, which required that every horse should be run on its merits and that a jockey should take all reasonable measures to ensure that the horse gives of its best. They found that the jockey was guilty of an offence and that the appellant was a party to the breach. The jockey was suspended for a year and the appellant was barred from running horses for a year, and was also deprived of his membership of the Australian Jockey Club.

The parties appealed to the committee of the Australian Jockey Club. After a full hearing the committee dismissed the appeals of Calvin and the jockey (although they allowed the appeal of a foreman, who had also been disqualified in connection with the offence).

Calvin then commenced action in the New South Wales Supreme Court against the chairman, committee and stipendiary stewards for declarations that his purported disqualification by the stewards and the purported dismissal of his appeal were void, and for an injunction restraining the respondents from acting on the basis that the purported disqualification was valid.

Calvin raised a number of grounds to support his action, but these were unsuccessful. However, although the trial judge found against Calvin, he accepted that in certain respects the stewards had failed to observe the principles of natural justice. But he held that the proceedings before the committee constituted a hearing *de novo* and that the defects

in the stewards' inquiry were thereby cured.

In the appeal to the Privy Council, the parties were not requested to argue whether the finding that the first hearing was defective was correct. The Board requested argument on the second aspect first, that is, whether any defect in natural justice could be cured by the appeal before the committee, and found that it was able to come to a decision by dealing with this question alone. It proceeded on the assumption that the first finding was correct, although Lord Wilberforce, delivering the opinion of the Board, did point out that 'a substantial argument could be put forward that there was no failure of natural justice at all' ([1979] 2 All ER 440 at 444).

Dealing with the second point, Lord Wilberforce stated:

'... their Lordships recognise and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured" through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so' (at 447h).

Lord Wilberforce mentioned that counsel had suggested that the decisions on this matter were in conflict, and that special emphasis in this regard had been laid upon an apparent conflict between *Annamunthodo v Oilfields Workers' Trade Union* (*supra*) (one of the cases approved by Botha JA in *Turner*) and *Pillai v Singapore City Council* [1968] 1 WLR 1278 (PC), both Privy Council cases. However, Lord Wilberforce thought that many of the inconsistencies would disappear or at least diminish on analysis, and that although it was not possible to lay down any general principle which would apply to all situations, it was possible to discern 'a number of typical situations as to which some general principle can be stated' (at 448).

- (a) On the one hand, 'there are cases where the rules provide for a rehearing by the original body, or some fuller or enlarged form of it'. Examples of such a situation are likely to be found in relation to social clubs, for example where 'the first hearing is superseded by the second, or, putting it in contractual terms, the parties are taken to have agreed to accept the decision of the hearing body, whether original or adjourned'.
- (b) On the other hand, or 'at the other extreme', said Lord Wilberforce, there 'are cases where, after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment etc) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage'.

It was *in this context only* that the Board accepted Megarry J's statement in *Leary*:

'If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? . . . As a general rule . . . I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body' ([1971] Ch 34 at 49).

For if this statement really purported to be a general principle, it was, in their lordships' opinion, too broadly stated:

'It affirms a principle which may be found correct in a category of cases; these may very well include trade union cases, where movement solidarity and dislike of a rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first (probably branch) level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect' (at 448e-f of the report of *Calvin's* case).

Lord Wilberforce emphasized that such intermediate cases do exist and that the court should always consider all the circumstances surrounding the 'appeal'.

Having made the distinction, his lordship went on to analyse a number of Australian, Canadian and New Zealand cases, showing that, in terms of the above distinction, most of these apparently conflicting cases could be reconciled. (See the report at 449-50.) So, for example, *Annamunthodo* ([1961] AC 945 (PC)), which was a trade union case in which it had been decided that an appeal could not cure a defect of natural justice at the first hearing, was not in conflict with *Pillai* ([1968] 1 WLR 1278 (PC)) after all; the latter case, which concerned the dismissal of an employee by an administrative body, was one where, even if natural justice should have been observed, a failure to do so had been cured by 'a rehearing by way of evidence *de novo*'.

In the light of this analysis, the Board found that the defects, if any, of the first inquiry by the stewards had been cured by the appeal to the committee. When the proceedings were looked at as a whole, the appellant's case had 'received, overall, full and fair consideration' (at 452 of the *Calvin* report).

### *Evaluation*

Is the reasoning of the Board really acceptable? On the face of it, the articulation of a range of categories, from the case where the appeal falls within a fairly rigid appeal structure to the case where the appeal (when viewed against the context of all the circumstances) is really a complete rehearing *de novo*, would appear to be a logical development of the dicta in cases such as *Turner* and *Pollock*. But the Board's reasoning is open to objection on at least two grounds:

(a) In the first place, by criticizing Megarry J's statement of a general rule, their lordships were really begging the question. Megarry J had

said: 'If the rules and the law combine to give the member the right to a fair trial *and the right of appeal . . .*' (my emphasis). When one finds that the 'appeal' was really a hearing *de novo*, and one concludes that—after a consideration of the rules (and the contract, if necessary)—the complainant must be 'taken to have agreed to accept the decision of the hearing body, whether original or adjourned' (see Lord Wilberforce at 448*a* of the *Calvin* report), there is obviously no right of appeal in existence at all.

(b) But if, after considering 'the rules and the law', one concludes that the complainant has a right to a *trial and an appeal*, 'why should he be told that he ought to be satisfied with an unjust trial and a "fair appeal"?' (Megarry J at 49E of the *Leary* report). For, as Megarry J went on to say: 'Even if the appeal is treated as a hearing *de novo*, the [complainant] is being stripped of his *right to appeal to another body* from the effective decision to expel him' (*ibid*; my emphasis). This difficulty was ignored by the Board, perhaps as a result of its failure to appreciate the tautology outlined in (a) above. Yet it is surely a fundamental point, and to ignore it introduces the danger that a right of appeal will disappear by sleight of hand.

#### *Further Problems*

Other questions of great relevance to our law are raised by these Commonwealth decisions. Some will be discussed briefly here, although each merits considerable attention in its own right.

*The duty to exhaust domestic or administrative remedies.* Is a party who claims that he has been denied natural justice at the first hearing required to exhaust his domestic remedies before approaching the court for relief?

Commentators have pointed out that the courts have not been clear on this point. (See, for example, Marinus Wiechers *Administratiefreg* (1973) 280ff; L A Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 76ff. Cf P Jackson *Natural Justice* (1973) 71ff.) *Turner* is, however, cited in South Africa as authority for the principle that a party need not exhaust his domestic remedies unless obliged to, expressly or impliedly, *by contract*. (See *Moodley v Shri Siva Subramanier Aulayam* 1979 (2) SA 696 (SE) at 698–700.) This was also the view taken by the Privy Council in *White v Kuzych* [1951] AC 585 (at 594–5), a case which was noted and distinguished by Laycraft J in *Pollock* (1979) 90 DLR (3d) (at 514–15). In South Africa there seems no dearth of authority for this view. (See the cases reviewed by Wiechers *loc cit* and Rose Innes *loc cit*. See also Marinus Wiechers 'Administrative Law' in *The Law of South Africa* ed W A Joubert I (1976) para 89 p 60.) Furthermore, it is recognized that this proposition can be extended to administrative remedies as well, if this is clear from the relevant statutory provisions. (See, for example, Rose Innes *op cit* 76–8.) Indeed, the ambit of statute and contract is so wide that the principle is stated the

other way round by both Rose Innes and Wiechers: that the general principle is that a complainant has a duty to exhaust his domestic or administrative remedies except in certain circumstances. (For the exceptions, see Rose Innes *op cit* 81ff; Wiechers in *LAWSA I* para 89 pp 60–1.)

Now the question I am concerned with here is whether a complainant should be obliged to exercise his right to *appeal* to a domestic or administrative appeal organ where the original hearing organ has failed to observe the principles of natural justice. Obviously, where this is required by the terms of a contract, the complainant has waived his right to approach the court. And where it is required by statute, the statute has ousted the jurisdiction of the court until such time as the administrative remedies have been exhausted. Apart from these situations, however, several policy reasons have been suggested as to why the general principle should apply in other situations: these remedies are often cheaper, perhaps quicker, than an application to court; and the appellate body may well reverse the decision, thereby removing the cause for complaint. (*Jockey Club of South Africa v Feldman* 1942 AD 340, 362. Cf Rose Innes *op cit* 76; Wiechers in *LAWSA I* para 89 p 60.) But it is also a time-wasting and futile pursuit if the appellate organ dismisses the appeal. To reiterate the point made by Megarry J in *Leary's* case:

'If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? . . . Even if the appeal is treated as a hearing *de novo*, the member is being stripped of his right to appeal to another body from the effective decision to expel him' ([1971] Ch 34 at 49).

But not only is the complainant being stripped of his right to more than one *fair* hearing, there is also an important policy argument against allowing *any* appeal from a hearing at which the principles of natural justice were not observed: that the appeal is by its very nature inevitably affected by what took place at the first hearing, unless it is a complete rehearing (in which case it is not an appeal in the present sense). To adopt a phrase used by Botha JA in *Turner* (at 658D of the report), the taint of the hearing is *carried forward* to the appeal. Where natural justice has been denied, the record of the first hearing will be fundamentally defective either because one party was not allowed to present his case and evidence adequately, or because the decision-maker was biased and his or its interpretation of the evidence will be coloured by this bias. The normal appeal is usually heavily influenced by the record of the original decision-making body. (For an analysis of the distinction between appeals in the wide sense and appeals in the ordinary sense, see A Rabie 'Administratiefregtelike Appelle' (1979) 12 *De Jure* 128.)

It is worth noting that the general principle is quite the reverse in England: there a complainant has no duty to exhaust domestic or

administrative remedies before approaching the court for review, except in certain special circumstances. (See H W R Wade *Administrative Law* 4 ed (1977) 561ff; S A de Smith *Judicial Review of Administrative Action* 3 ed (1973) 374–6.)

*The void/voidable distinction.* Intertwined with this question is the void/voidable issue. Is a decision reached in breach of natural justice void, or is it merely voidable; or is this even a meaningful distinction? If it is void *ab initio* would there be any decision from which to appeal? This point is recognized by Wiechers, who balks at the logical consequences of allowing immediate review of all *ultra vires* decisions. (See *Administratiefreg* 282.)

In South Africa it is said that decisions which are in substance *ultra vires* are void *ab initio*, but that decisions made in breach of natural justice are merely voidable. (See Rose Innes *op cit* 93–4, 157; Wiechers *op cit* 237 and in *LAWSA I* para 82 p 51.)

Rose Innes justifies the distinction on two grounds: (a) because natural justice is a requirement of the common law, whereas substantive *vires* are usually determined by statute (*op cit* 93); and (b) an affected party may waive or forfeit his right to object to a decision reached in breach of natural justice, in which case the decision stands; whereas an '*ultra vires* proceeding or decision which is void *ab initio* . . . cannot be cured by waiver, acquiescence or default' (*op cit* 157).

Wiechers relies rather on case authority and cites two cases: *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) at 891A–C and *Adjunk-Minister van Landbou v Heatherdale Farms (Pty) Ltd* 1970 (4) SA 184 (T) at 195E. It is clear that the *Heatherdale Farms* case does support Wiechers:

'Dit is waar dat die respondente nie enige regte as gevolg van die appellant se beslissing verkry het nie, maar dit is nie omdat die beslissing *ipso iure* nietig was nie. Die nie-nakoming van die *audi alteram partem*-reël het wel die beslissing aanvegbaar gemaak, maar dit was nie sonder meer nietig nie' (per Trengrove J at 195E–F of the report).

However, the *Winter* case is not in point: in this case Ogilvie Thompson CJ (for the unanimous court) specifically held that the rule *audi alteram partem* did not *apply* to the facts of the case—he did not hold that the rule did apply but that in this case the failure to observe it did not invalidate the decision:

' . . . the exercise of those powers is, by reason of the various features I have mentioned, not subject to the maxim *audi alteram partem* and . . . , consequently, the issue of the deportation orders was not invalidated by the circumstance that no prior opportunity was accorded to the appellants to make representations against such issue' (1973 (1) SA 873 at 891C–D).

And in any event, the Chief Justice was concerned with an ouster clause removing the court's jurisdiction (s 1(3) of Proclamation 50 of 1920 (SWA) as amended) and the possibility of getting around this on the grounds of 'manifest absence of jurisdiction'.

So far as other cases are concerned, the courts here do not seem to have directed their attention to the question, although Jansen JA in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A) has perhaps provided some (albeit ambiguous) support for the contrary view:

'Dat die fundamentele beginsels van geregtigheid hier in gedrang gekom het en dat derhalwe die beslissing van die Algemene Sindale Kommissie *nietig* verklaar moet word, skyn duidelik te wees' (at 29D; my italics).

(Cf Jerold Taitz 'But 'Twas a Famous Victory' 1978 *Acta Juridica* 109 at 121.)

So it is worth considering the apparent underlying justifications (as put forward by Rose Innes and outlined above) for the distinction between the status of a substantively *ultra vires* decision and one reached in breach of natural justice.

*Common law and statutory vires.* The mere fact that an official or body is required to observe requirements which are stipulated by the common law (and not excluded by statute), for example, the requirements of natural justice, does not render the requirements any the less important or necessary to fulfil than the requirement of *vires*. It is merely that these requirements originate from a different legal source. Common law and statute law act symbiotically to determine the extent of the *vires* of the official or body and hence the legality of his or its acts. Thus it seems to me that this distinction is not a satisfactory ground for describing decisions reached in breach of natural justice as voidable, not void.

*The right to natural justice may be waived or forfeited.* The real reason for the distinction between the status of acts made in breach of natural justice and other *ultra vires* acts is, I believe, the fact that a right to object to a violation of natural justice may be waived or forfeited. It does seem to be inconsistent to state that an *ultra vires* act is a 'mere nullity'—'there has been no decision at all'—while accepting that where it is only natural justice that has been ignored such a decision still stands unless and until it is set aside on review or declared void by the court. But even this 'justification' is unacceptable once it is appreciated that any *ultra vires* act has legal effect until it is set aside.

Even where a party chooses to ignore the act, he will be obliged to prove its invalidity when raising its invalidity as a defence. Just as an affected party may waive his right to object to a decision reached in breach of natural justice, so he may accept as valid an *ultra vires* decision affecting him. The only difference is that in the latter case another party (for instance, the state) may have *locus standi* to attack the act or decision.

This truth has been recognized in England, where the void/voidable distinction has been the subject of considerable dispute. (See the references in S H Bailey, C A Cross and J F Garner *Cases and Materials in Administrative Law* (1977) 570, as well as Wade *Administrative Law* 296–301, 560–1 and Jackson *Natural Justice* chap 6.) There, although it

was said in some cases that an act done in breach of natural justice was only voidable (for example, *Dimes v Grand Junction Canal* (1852) 3 HLC 759 (10 ER 301) and *Durayappah v Fernando* [1967] 2 AC 337 (PC)), since *Ridge v Baldwin* [1964] AC 40 (HL) it has been clear that the English courts accept such an act as void:

'Then there was considerable argument whether in the result the . . . decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in *Wood v Wood* (1874) LR 9 Exch 190. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case' (per Lord Reid in *Ridge* at 80).

Jackson (*Natural Justice* 69–70) relies upon the fact that Lords Evershed and Devlin (in *Ridge* at 86 and 141–2 respectively) regard the decision as only voidable, for the view that the issue is not yet settled. And there have been other academic adherents to the 'voidable' school in the case of natural justice. (See A Rubinstein *Jurisdiction and Illegality* (1965) 221, a most important study of the question, and D M Gordon 'Certiorari and the Revival of Error in Fact' (1926) 42 *LQR* 521 at 523.) However, despite occasional aberrations to the contrary (see the discussion by H W R Wade (1977) 93 *LQR* 8 at 10–11 and N P Gravells 'Time Limit Clauses and Judicial Review—The Relevance of Context' (1978) 41 *Modern LR* 383 at 392–3), since the brilliant analysis of the issue by Wade in a two-part article ('Unlawful Administrative Actions: Void or Voidable?' (1967) 83 *LQR* 499, (1968) 84 *LQR* 95, especially 101ff) it has become accepted by the courts and even former dissenters (see, for instance, Lord Denning in his book *The Discipline of Law* (1979) 77–8) that an act done in breach of natural justice is void, not voidable. The major obstacle was that it seems awkward that a void act may have legal consequences unless and until set aside. But, as Wade has pointed out,

' . . . once the court condemns [an order] as being void, it is seen to have been destitute of all legal effect from the outset. An order which is merely voidable, on the other hand, has legal effect up to the time when it is quashed, and in respect of that period it remains a valid order even after being quashed' (*Administrative Law* 297).

Even if the act or order is void, it is a matter of factual necessity that a court order must be obtained declaring this to be the case, failing which it will have legal effect just as if it were valid. And this is equally true of acts contrary to natural justice and other illegal acts. It is not necessary that the act be absolutely void in the sense that it has no effect whatsoever. Thus a void act may even have legal effect *ad infinitum* where, for instance, a remedy is denied (for example, where prescription prohibits the claimant from approaching the court).

This reasoning has now been fully accepted by the Privy Council in *Calvin's case*:

'The first issue arising in this appeal is whether the committee had any jurisdiction to enter on the appeal. The appellant's proposition is that it had not, for the reason that the stewards' "decision" was, on the assumption stated, void. A condition precedent, it was said, of an appeal was the existence of a real, even though voidable, decision.

This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix on one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal. The decision of the stewards resulted in disqualification, an effect with immediate serious consequences for the appellant. This was a fact: the appellant's horses could not run in, or be entered for any race; the appellant lost his membership of the Australian Jockey Club and could be excluded from their premises. These consequences remained in effect unless and until the stewards' decision was challenged and, if so, had sufficient existence in law to justify an appeal' ([1979] 2 All ER 440 (PC) at 445-6).

Lord Wilberforce went on to give the example of a criminal trial during which took place serious irregularities but the judgment of which nevertheless had legal effect until set aside on appeal, even though the trial was 'in truth no trial at all'.

What is the conclusion to be drawn from this way of looking at the meaning of 'void' for the purposes of natural justice? In effect, it means that although the decision or act is void (since the official or body had no power to act without observing natural justice), it must be declared to be so in order to strip the act of its ostensible legal respectability and effect. Thus the act is not necessarily a mere nullity with no existence at all: it may even acquire legal respectability through the operation of prescription or the refusal of a court (in its discretion) to grant, say, a mandatory interdict. (Cf the discussion of this discretion in *Cape Town Municipality v Abdulla* 1974 (4) SA 428 (C) at 437; and cf *Wade Administrative Law* 566ff; *De Smith Judicial Review* 130ff.) Needless to say, the same effect applies in the case of ouster clauses and the waiving or forfeiture of rights by a complainant.

In addition, although the act or decision is void, it can be appealed against, since it exists and has effect. Thus there is no anomaly in appealing to a domestic appeal body where there has been a failure of natural justice in connection with the original decision. However, the complainant may equally seek a declaration that the original decision is void.

What is the importance of the distinction between void and voidable? Jackson suggests that such a distinction provides no useful guide. (See *Natural Justice* 69; and cf Lord Evershed in *Ridge* [1964] AC 40 (HL) at 86.) But this view ignores two important consequences of considering the act or decision void and not voidable:

(a) If it is void, then it is possible for the complainant to approach the court immediately without exhausting his domestic remedies, and to obtain relief by means of a declaratory order only, without the need to obtain any other order as well (*Standard Bank of SA Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T) at 105–6).

(b) To regard an act as void has the effect of encouraging a court to strike it down for want of jurisdiction: for ultimately the question whether an act is void or voidable boils down to the view one takes of jurisdiction. (See M Akehurst 'Void or Voidable?—Natural Justice and Unnatural Meanings' (1968) 31 *Modern LR* 2, 138. Cf the approach of Ogilvie Thompson CJ in *Winter* 1973 (1) SA 873 (A) at 891B and Innes CJ in *Union Government v Fakir* 1923 AD 466 at 469–70, and *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675.) There is no space here to go into the question of jurisdiction. However, though it is plain that our courts take a much narrower view of jurisdiction than do the English courts (compare Muller JA in *Theron* 1976 (2) SA 1 (A) at 35B–D and Taitz op cit 1978 *Acta Juridica* 109 at 116–19 with *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and—more drastically—*Pearlman v Keepers and Governors of Harrow School* [1979] QB 56; Lord Denning *The Discipline of Law* 74ff), I have tried to show that it is inconsistent to contend that while a body or official has no power (jurisdiction) to act 'substantively *ultra vires*', it does have power (jurisdiction) to disregard the common law (viz the requirements of natural justice) unless the affected party objects.

(c) One may well ask: since any 'void' act may have to be declared to be so by the courts, why are they not all voidable? Rubinstein (*Jurisdiction and Illegality passim*) distinguishes between void and voidable acts on this very basis: viz that acts which require to be set aside are only voidable, whereas a 'void' act can only be one which is utterly void and which requires no setting aside at all. But to those whose ideological bent is in favour of strict legality on the part of the administration, this approach carries with it the danger of affording the court an additional opportunity to validate an act which, even though not in conformance with the strict principles of legality, the court feels should stand, perhaps because the court suspects that the organ concerned would have reached the same decision anyway. (See Wade op cit (1968) 84 *LQR* 95 at 110–15.)

### Conclusion

(a) There is a general principle in our law that a defect of natural justice cannot be cured by a domestic or administrative appeal. What is required is a hearing *de novo*. Although such a general principle has been doubted by the Privy Council in *Calvin's* case, there is no reason to assume that the principle is in any doubt in South Africa.

(b) However, a hearing *de novo* should not be accepted as a substitution for the right to appeal from a decision. This important point

made by Megarry J in *Leary* appears to have been fully accepted by our Appellate Division in *Turner*.

(c) Although our case law and commentators clearly indicate that, as a general principle, a complainant should exhaust his domestic and administrative remedies before seeking relief in the courts, I have suggested that where there has been a defect of natural justice this principle is undesirable for at least two pragmatic reasons: first, it expects a complainant to be satisfied with an unjust hearing and a fair appeal; and, secondly, the taint of the unjust hearing is inevitably carried forward to the appeal.

(d) Furthermore, there is the interesting logical problem concerning the status of the act or decision that is defective by reason of failure to observe the principles of natural justice. The position in our law appears to be that such a decision is voidable, not void. However, I have suggested that this would be anomalous and that there is no difficulty with the proposition that failure to observe natural justice constitutes a void act. In doing so, I have made special reference to the recent developments in England, but am acutely aware that this issue requires much fuller consideration than space here provides.

L G BAXTER